EDITOR'S NOTE

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ORIGINAL

No. 98-1418

Supreme Court, U.S.
FILED
MAR 9 1999
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF FLORIDA,

Petitioner,

ANTHONY LANCASTER,

Respondent.

Respondent's Response to
PETITION FOR WRIT OF CERTIORARI
to The Florida Supreme Court

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

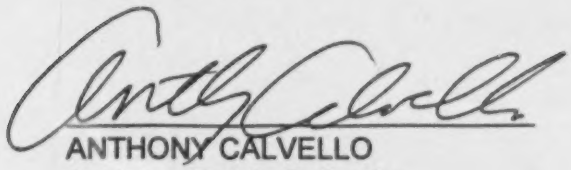
Respondent, Anthony Lancaster, asks leave to accept for filing Respondent's Brief in Opposition to the Petitioner's *Writ of Certiorari* to the Florida Supreme Court without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39, 18 U.S.C. § 3006A(d)(6). The filing of this petition is accompanied by an affidavit as required by Supreme Court Rule 39. Respondent, Anthony Lancaster, was declared indigent and the Public Defender's Office of the Fifteenth Judicial Circuit was appointed to represent Petitioner on appeal to the Florida District Court of Appeal.

WHEREFORE, Petitioner, Anthony Lancaster, prays for leave to proceed *in forma pauperis*.

29 pp

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



ANTHONY CALVELLO
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421 Third Street, 6th Floor
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Attorney for Respondent Anthony Lancaster

UNITED STATES

Case No. A-739

STATE OF FLORIDA,

Petitioner,

vs.

ANTHONY LANCASTER,

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW, ANTHONY LANCASTER, respondent ~~petitioner~~, in the above-styled cause and, pursuant to the provisions of Title 28, United States Code, Section 1915, respectfully moves for leave to proceed in forma pauperis without prepayment of fees, costs or security given therefor.

Dated: April 6, 1999

anthony Lancaster
Signature

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, ANTHONY LANCASTER, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that thet nature of this action is as follows:

I further swear that the responses which I have made to questions and instructions hereinbelow relating to may ability to pay the cost of this action are true.

1. Are you presently employed? Answer: Yes

   a. If answer is "yes", state the amount of your salary or wages per month and give the name and address of your employer.
   b. If answer is "no", state the date of last employment, and the amount of the salary and wages per month which you received.

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6290 Old Dixie, Vero Beach Fl 32967

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments interest, dividends, or other source? Answer: NO.

   a. If answer is "yes", describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Answer: Yes

a. If answer is "yes", state the total value of the items owned.

$ 250

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishing and clothing)? Answer: NO

a. If answer is "yes", describe property and state approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Gena P. Lancaster - Wife

Alden Lancaster - Son

I fully understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

anthony Lancaster
Signature

SUBSCRIBED AND SWORN TO before me this
16th day of April 1999.
By Anthony Lancaster
Who is personally known to me.
Gail A. Anderson

NOTARY PUBLIC STATE OF FLORIDA
GAIL A. ANDERSON
COMMISSION # CC617902
EXPIRES MAR 18, 2001
BONDED THROUGH
ATLANTIC BONDING CO., INC.

No. 98-1418

==========

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF FLORIDA,

Petitioner,

ANTHONY LANCASTER,

Respondent.

AFFIRMATION OF SERVICE

I HEREBY AFFIRM, pursuant to Supreme Court Rule 29.5, that on this 9th day of April 1999, true copies of the Motion for Leave to Proceed *In Forma Pauperis* were mailed first class in a postage paid envelope to Robert A. Butterworth, Attorney General; Carolyn M. Snurkowski, Assistant Deputy Attorney General and Charlie McCoy, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, (850) 487-1963 (for Petitioner), Anthony Lancaster, 374 16th Street SW, Vero Beach, Florida 32962-6634.

All parties required to be served have been served.

I further certify that the foregoing is true and correct.

Executed on April 9, 1999.

DATED this 9th day of April 1999.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar No. 266345
The Criminal Justice Building
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West Palm Beach, Florida 33401
(561) 355-7600

Attorney for Respondent Anthony Lancaster

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy the Respondent's Response to Petition for Writ of Certiorari to the Florida Supreme Court has been furnished to Robert A. Butterworth, Attorney General; Carolyn M. Snurkowski, Assistant Deputy Attorney General and Charlie McCoy, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 by U.S. Mail on this 9th day of April 1999.

Attorney for Respondent Anthony Lancaster

LB

No. A-739

98-1418

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

STATE OF FLORIDA,

Petitioner,

ANTHONY LANCASTER,

Respondent.

Responents Brief in Opposition to the
PETITION FOR WRIT OF CERTIORARI

RICHARD L. JORANDBY
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(561) 355-7600

Attorney for Respondent Anthony Lancaster

QUESTION PRESENTED

Has the Florida Supreme Court in the instant cause, *State v. Lancaster*, 24 Fla. L. Weekly S30 (Fla. Dec. 24, 1998) correctly applied this Honorable Court's decision in *Lynce v. Mathis*, 519 U.S. 433(1997) on remand?[Restated].

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OPINIONS BELOW

The Opinion of the Florida Supreme Court in *State v. Lancaster*, 24 Fla. L. Weekly S30 (Fla. Dec. Dec. 24,1999). See Appendix.

The Opinion of the Florida Supreme Court in *Lancaster v. State*, 687 So. 2d 1299 (Fla. 1997) was vacated by this Honorable Court on the authority of *Lynce v. Mathis*, 519 U.S. 433 (1997). See *Lancaster v. Florida*, 118 S.Ct. 37 (1997).

CONSTITUTIONAL PROVISION INVOLVED

Ex Post Facto Clause, Article I, Section 10 United States Constitution: No state shall . . . pass any bill of attainder, ex post facto law . . . .

STATEMENT OF THE CASE AND FACTS

Respondent, Anthony Lancaster, was charged by information filed in the Nineteenth Judicial Circuit, in and for Indian River County, Florida, with second degree murder. This offense was alleged to have occurred on May 3, 1987.

Respondent was sentenced to seventeen (17) years in prison to be followed by ten (10) years probation. He was subsequently released from prison after completion of the incarceration portion of his "split-sentence". He commenced serving the probationary portion of his "split sentence" on July 7, 1993. On August 3, 1994, Respondent was found guilty of violating his probation and said probation was revoked by the trial judge.

The trial judge sentenced Mr. Lancaster to thirty (30) years in prison with "credit for all time [he] served previously in the Department of Corrections." See *Lancaster v. State*, 656 So. 2d 533, 534 (Fla. 4th DCA 1995). The written sentence order signed by the sentencing judge provided that Respondent was sentenced to thirty (30) years in prison with credit for 344 days "county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number [87-00351]." *Id.* at 534.

On appeal to the Florida Fourth District Court of Appeal, Respondent Lancaster argued that the trial judge erred in failing to award Respondent the full seventeen (17) years in prison as credit for time served against the thirty (30) year sentence imposed upon Respondent for violating his probation. As previously noted, Respondent had

originally been sentenced to seventeen (17) years in prison to be followed by a term of probation for this same offense.

The Fourth District in a written opinion, *Lancaster v. State* 656 So. 2d 533 (Fla. 4th DCA 1995) initially held that Respondent's thirty (30) year sentence which exceeded the applicable Florida guidelines range had to be reduced on remand to twenty seven (27) years in prison. *Id.* at 534.

As to the proper credit for "time served" to be awarded, the Fourth District ruled on the basis of the *ex post facto* clause and a Florida Supreme Court decision, *Orosz v. Singletary*, 655 So. 2d 1112 (Fla. 1995), that "if upon remand it is determined that defendant completed his original sentence *prior* to 1993, when the legislature enacted section 944.278 and *retroactively canceled all awards of gain time and provisional credits* defendant should properly be credited not only with earned gain time but with administrative gain time and provisional credits." *Id.* at 535.[Emphasis Supplied]. The Fourth District held:

> To retroactively cancel administrative gain time and provisional credits would unconstitutionally violate a defendant's constitutional rights against ex post facto laws and bills of attainder.

Id. at 534-535.

The Florida Supreme Court in a written opinion, *State v. Lancaster*, 687 So. 2d 1299 (Fla. 1997), reversed the decision of the Fourth District Court of Appeal and held:

> "Administrative gain time and provisional credit statutes were not enacted for the benefit of prisoners; those statutes were enacted merely to afford the Department a procedure to

> alleviate prison overcrowding. We further concluded in *Calamia* that the retroactive cancellation of administrative gain time and provisional credits does not run afoul of ex post facto proscriptions. Because the unique circumstances presented in *Orosz* are not applicable to Lancaster and because Lancaster has no vested interest in any previously awarded administrative gain time or provisional credits, we conclude that Lancaster is not entitled to credit for any such time awarded during the incarcerative portion of his initial sentence. Accordingly, we quash the district court's decision to the extent it holds that all inmates who committed an offense before October 1, 1989, and who complete their sentences prior to the 1993 enactment of section 944.278 have a vested right in previously awarded administrative gain time and provisional credits, and we remand this case for further consideration."
>
> *Id.* at S53.

On February 19, 1997, this Court issued its decision in *Lynce v. Mathis,* 519 *U.S. 433,* 117 S.Ct. 891 (1997). This Court in *Lynce* held that the retroactive cancellation of administrative and provisional credits awarded to inmates violates the *ex post facto* clause of the United States Constitution. *Lynce*, 117 S.Ct. at 897-898.

Respondent Lancaster filed a writ of certiorari in this Court which was granted and this case was remanded to this Honorable Court for further consideration in light of the *Lynce* decision. *Lancaster v. Florida,* -U.S.-, 118 S.Ct. 37, 139 L. Ed 2d 5 (1997).

The Florida Supreme Court in a written opinion on remand from this Court[1] held that on the authority of *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891(1997), that the State

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[1] This Court granted Petitioner Anthony Lancaster's petition for writ of certiorari and vacated the Florida Supreme Court's decision in *State v. Lancaster*, 687 So. 2d 1299(Fla. 1997) and remanded this cause "to the Supreme Court of Florida for further consideration in light of *Lynce v. Mathis*, 519 U.S. —, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)." *Lancaster v. State of Florida* 118 S.Ct. 37 (Mem)(1998)

of Florida in conformity with the *Ex Post Facto* Clause of the United States Constitution[2] "cannot cancel or forfeit Lancaster's Provisional Credits or his Administrative Gain Ti me." *Id.* The Florida Supreme Court explained:

> In the present case, as in Lynce's case at the time of Lancaster's offense overcrowding gain time had already been provided for by statute. See S 944.598, Fla. Stat. (Supp.1986) (Emergency Gain Time); S 944.276, Fla. Stat. (1987)(Administrative Gain Time). Accordingly, Lancaster could have contemplated receiving overcrowding credits at th e time of his offense. Furthermore, Lancaster did receive these credits and was actually released by way of the above-mentioned statutes. **Furthermore, when Lancaster was released on probation, the 1993 Safe Streets Initiativ e had not been enacted yet.** Thus, akin to the situation with Lynce, Lancaster's "hope" of receiving overcrowding gain time had become a reality.
>
> As mentioned above, the Safe Streets Initiative was enacted in 1993, long after Lancaster's underlying offense an approximately two years after his release on probation. If the State were to now apply that later-enacted law to Lancaster and cancel his over-crowding gain time, the effect of that law would be to retroactively take away something to which Lancaster had an expectation at the time of his offense, actually received during his incarceration, and actually retained after revocation or must now be awarded because the 1989 forfeiture provision, section 944.28(1), may not be applied to him (as discussed above). We find that the application of the Safe Streets Initiative to Lancaster now would result in the taking of something which was certainly not speculative. Accordingly, we conclude that under the analysis of *Lynce*, the State cannot apply section 944.278 (the Safe Streets Initiative) to Lancaster to cancel his Administrative Gain Time or Provisional Credits without violating the Ex Post Facto Clause.
>
> *Id.* at S 31-32.[Emphasis Added].

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[2] Article I, section 10 Unites States Constitution.

REASONS FOR DENYING THE WRIT

This Honorable Court in *Lynce* v. *Mathis*, *supra*, held that the retroactive cancellation of administrative and provisional credits awarded to inmates violates the *ex post facto* clause of the United States Constitution. This Court initially noted:

> In this case the operation of the 1992 statute to effect the cancellation of overcrowding credits and the consequent reincarceration of petitioner was clearly retrospective. The narrow issue that we must decide is thus whether those consequences disadvantaged petitioner by increasing his punishment.
>
> * * * *
>
> According to petitioner, although this case involves overcrowding credits, it is essentially like *Weaver* because the issuance of these credits was dependent on an inmate's good conduct. Respondents on the other hand submit that *Weaver* is not controlling because it was the overcrowded condition of the prison system, rather than the character of the prisoner's conduct, that gave rise to the award. In our view, both of these submissions place undue emphasis on the legislature's subjective intent in granting the credits rather than on the consequences of their revocation. In arriving at our holding in *Weaver*, we relied not on the subjective motivation of the legislature in enacting the gain-time credits, but rather on whether objectively the new statute "lengthened the period that someone in petitioner's position must spend in prison." Id., at 33.
>
> * * *
>
> Similarly, in this case, the fact that the generous gain-time provisions in Forida's 1983 statute were motivated more by the interest in avoiding over crowding than by a desire to reward good behavior, is not relevant to the essential inquiry demanded by the Ex Post Facto Clause: whether the cancellation of 1,860 days of accumulated provisional credits had the effect of lengthening petitioner's period of incarceration.

Id. at 896.

Further, this Court made clear that they did not imply in *California Dept. Of Corrections* v. *Morales*, 514 U.S. 499, 115 S.Ct. 1997 (1995) "that the constitutionality of retroactive changes in the quantum of punishment depended on the purpose behind the parole sentencing system." This Court explained that in *Lynce* unlike "*Morales*, there is no evidence that the legislature's change in the sentencing scheme was merely to save time or money. Rather, it is quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses who had accumulated overcrowding credits. As we recognized in *Weaver*, retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are "one determinant of petitioner's prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed." *Id.* at 897-898.

The Florida Supreme Court correctly applied this Court's *Lynce* decision to Respondent's cause on remand. The Florida Supreme Court held that on the authority of *Lynce v. Mathis, supra*, that the State of Florida in conformity with the *Ex Post Facto* Clause of the United States Constitution [3] "cannot cancel or forfeit Lancaster's Provisional Credits or his Administrative Gain Time." *Id.* at *S32*. The Florida Supreme Court explained:

> In the present case, as in Lynce's case at the time of Lancaster's offense overcrowding gain time had already been

---

[3] Article I, section 10 Unites States Constitution.

> provided for by statute. See S 944.598, Fla. Stat. (Supp.1986) (Emergency Gain Time); S944.276, *Fla. Stat.* (1987)(Administrative Gain Time). Accordingly, Lancaster could have contemplated receiving overcrowding credits at the time of his offense. Furthermore, Lancaster did receive these credits and was actually released by way of the above-mentioned statutes. **Furthermore, when Lancaster was released on probation, the 1993 Safe Streets Initiative had not been enacted yet.** Thus, akin to the situation with Lynce, Lancaster's "hope" of receiving overcrowding gain time had become a reality.
>
> As mentioned above, the Safe Streets Initiative was enacted in 1993, long after Lancaster's underlying offense an approximately two years after his release on probation. If the State were to now apply that later-enacted law to Lancaster and cancel his over- crowding gain time, the effect of that law would be to retroactively take away something to which Lancaster had an expectation at the time of his offense, actually received during his incarceration, and actually retained after revocation or must now be awarded because the 1989 forfeiture provision, section 944.28(1), may not be applied to him (as discussed above). We find that the application of the Safe Streets Initiative to Lancaster now would result in the taking of something which was certainly not speculative. Accordingly, we conclude that under the analysis of *Lynce*, the State cannot apply section 944.278 (the Safe Streets Initiative) to Lancaster to cancel his Administrative Gain Time or Provisional Credits without violating the Ex Post Facto Clause.
>
> *Id.* at S 31-32.[Emphasis Added].

Petitioner argues in its petition that somehow the State can refuse to recognize, award, or credit, the vested overcrowding credit already awarded and vested in Respondent, Mr. Lancaster, in July, 1993 for subsequent conduct in 1994 the State deems to be "failure to abide by the term of his probation" (Petition page 6) or "did something unlawful, by violating probation, after the 1993 statute took effect" (Petition, page 16) even though no Florida statute allowed the forfeiture of gain time credits at the

time Respondent's crime was committed (1987) the only relevant date for *ex post facto* analysis.

First, this Honorable Court has made clear for *ex post facto* purposes it is the law at the time the criminal offense was committed that controls. See *Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960 965(1981); *Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446 (1987). The law applicable at the time of a subsequent revocation of probation would be irrelevant for *ex post facto* considerations. Further, Respondent committed his offense prior to the enactment in 1989 of a *Florida Statute*, Section 944.28(1), *Florida Statutes* (1989) which authorized the forfeiture of gain time earned for a violation of probation.

Second, Petitioner's argument that subsequent bad conduct can overcome the *ex post facto clause* was rejected by the Florida Supreme Court citing *Lynce* in *Britts v. Chiles*, 704 So. 2d 1046, 1047 (Fla.1997):

> The department [of Corrections] argues that application of the new statute and rule to Britt do not violate the ex post facto clause of the federal or Florida constitutions because they alter penalties associated with in-prison misconduct and relate to penalties that are directed solely to the new conduct. Further, the department contends that, because sanctions for possible future prison misconduct do not constitute a "significant" factor for either the trial judge or defendant with regard to plea bargains or calculation of the sentence imposed, the ex post facto clause is not implicated. The department's arguments are essentially the same arguments it made recently in *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997); that is, that changes relating to future events (in this case future misconduct), do not constitute a "significant factor" for either the trial judge or defendant at the time of sentencing. Rather, the department argues that disciplinary confinement and forfeiture of gain-time or the right

> to earn gain-time are merely management tools used to control and modify improper behavior. Further, the department argues that section 944.281 is merely a further refinement of section 944.28. Under the United States Supreme Court decision in *Lynce*, we are compelled to conclude that both of these arguments must fail.
>
> *Id.* at 1048.

More importantly this argument was also rejected in a case cited with approval by this Court in *Weaver v. Graham, supra*, *Greenfield v. Scafati*, 277 F. Supp. 644 (Mass.1967)(Three-judge court) *summarily aff'd*, 390 U.S. 713, 88 S.Ct. 1409 (1968), wherein the three (3) judge panel held that the application of Massachusetts statute forbidding a prisoner from earning good conduct deductions for the first six months after his reincarceration following violation of parole of prisoner who had been sentenced for crime before enactment thereof and who was paroled after its enactment would be a violation of constitutional prohibition against *ex post facto* laws. *Greenfield*, 277 F.Supp.at 644.

The Greenfield decision has been acknowledged as a United States Supreme Court precedent. See *Williams v. Lee*, 33 F.3d 1010(8th Cir.1994). The Eight Circuit in Williams held that the revocation of defendant's accumulated good-time credits upon his violation of parole, pursuant to authority of legislation enacted after the defendant petitioner had committed offense that resulted in his conviction and sentence but before he had been released on parole, was an *ex post facto* violation. *Williams*, 33 F3d at 10

And finally, Petitioner citing *U.S. v. Reece*, 71 F.3d 582 (6th Cir. 1995) argues that the Sixth Circuit Court of Appeals has "recognized the critical distinction between laws

which change the penalty imposed for the original offense as opposed to laws which change the penalties for new behavior which results in the revocation of post-release supervision" (Petition, page17 n 12). However Respondent notes that this type argument has been rejected by the Ninth Circuit in *U.S. v. Paskow*, 11 F. 3d 873(9th Cir. 1993), and the Second Circuit in *U.S. v. Meeks*, 25 F. 3d 1117(2d Cir. 1994).

The Florida Supreme Court correctly applied this Court's decision in *Lynce* v. *Mathis*, *supra*, in the instant cause and found an *ex post facto* violation existed in this situation. Hence, this Honorable Court should **DENY** Petitioner State of Florida's Petition For Writ Of Certiorari.

CONCLUSION

Wherefore, for the above reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

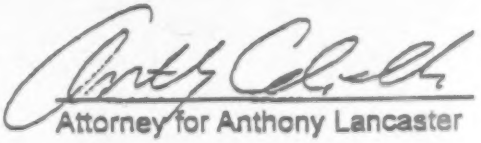
RICHARD L. JORANDBY
Public Defender

ANTHONY CALVELLO
Assistant Public Defender
Fifteenth Judicial Circuit of Florida
Florida Bar # 266345
The Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Attorney for Anthony Lancaster

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to Carolyn M. Snurkowski, Assistant Deputy Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 this 9th day of March 1999.



Attorney for Anthony Lancaster

APPENDIX

"compelling governmental interest."

* * *

Criminal law—Habeas corpus—Gain time—Ex post facto principles apply to overcrowding credits—State has statutory authority to forfeit administrative gain time or provisional credits upon revocation of probation, but only for offenses committed on or after October 1, 1989, the effective date of amendments providing for such forfeitures—Section 944.278, the "Safe Streets Initiative," cannot be used to cancel gain time of inmates who were released on supervision before enactment of statute

STATE OF FLORIDA, Petitioner, vs. ANTHONY LANCASTER, Respondent. Supreme Court of Florida. Case No. 86,312. December 24, 1998. Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. 4th District - Case No. 94-2471 (Indian River County). Counsel: Robert A. Butterworth, Attorney General, Celia Terenzio, Bureau Chief, Assistant Attorney General, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for Petitioner. Richard L. Jorandby, Public Defender, and Anthony Calvello, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for Respondent.

(OVERTON, J.) The United States Supreme Court vacated our decision in *State v. Lancaster*, 687 So. 2d 1299 (Fla. 1997), and remanded the case for further consideration in light of its decision in *Lynce v. Mathis*, 519 U.S. 433 (1997); *See Lancaster v. Florida*, 118 S. Ct. 37 (1997). This is another case involving the application of ex post facto principles to a legislative change in the gain time statutes. In our prior opinion we found there was no ex post facto violation and that the legislature could constitutionally make a disadvantageous, retroactive change in Administrative Gain Time because overcrowding gain time was designed to alleviate unpredictable prison overcrowding. As explained in more detail below, we find that the United States Supreme Court decision in *Lynce* mandates a holding that ex post facto principles do apply to overcrowding credits. In this opinion we approve in part and quash in part the Fourth District Court of Appeal's decision in *Lancaster v. State*, 656 So. 2d 533 (Fla. 4th DCA 1995). We further instruct the State to apply the principles expressed in this decision to all similarly situated inmates. We note that this case is distinguishable from *Meola v. Department of Corrections*, Nos. 89,982, 90,148 & 90,241 (Fla. Dec. 24, 1998) [24 Fla. L. Weekly S27], and *Thomas v. Singletary*, Nos. 90,128, 90,188 (Fla. Dec. 24, 1998) [24 Fla. L. Weekly S26], in which we are denying relief. *Meola* and *Thomas*, as well as another gain time case, *Gomez v. Singletary*, Nos. 90,642, 90,654 90,655, 90,759 & 90,829 (Fla. Dec. 24, 1998) [24 Fla. L. Weekly S33] (granting relief) are being released simultaneously with this case.[1] At the outset, it must be recognized that neither the legislature, the attorney general, nor this Court has been able to convince the United States Supreme Court that the Ex Post Facto Clause in the United States Constitution does not apply to gain time statutes. In 1979, we held in accordance with the theory and argument of the Attorney General that gain time statutes were a matter of legislative grace. *See Harris v. Wainright*, 376 So. 2d 855 (Fla. 1979). At approximately the same time, we denied another petition relying on *Harris*. *See Weaver v. Graham*, 376 So. 2d 855 (Fla. 1979). On certiorari to the United States Supreme Court, that Court disagreed and reversed our judgment in *Weaver v. Graham*, 450 U.S. 24 (1981). The Supreme Court found that a legislative act changing the gain time statutes enacted after the commission of a criminal act could not constitutionally be used to extend a defendant's sentence. *Id.* at 968. More recently, in 1996, we again accepted the State's view that the cancellation of gain time given inmates for the purpose of relieving prison overcrowding did not violate ex post facto principles because overcrowding gain time was not "earned," but rather, was awarded solely for administrative purposes, and therefore an inmate had no vested right in retaining such gain time. *See Calamia v. Singletary*, 686 So. 2d 1337 (Fla. 1996). Again that view has been rejected and our opinions in *Calamia* and this case have been vacated by the United States Supreme Court. *See Calamia v. Singletary*, 117 S. Ct. 1309 (1997) (judgment vacated pursuant to *Lynce*), *mandate confirmed to*, 692 So. 2d 933 (Fla. 1997) (relief granted on remand); *Lancaster v. Florida*, 118 S. Ct. at 37.

As noted by the chart in the attached appendix, there have been multiple statutes providing for relief of prison overcrowding which, together with the United States Supreme Court decisions, have caused major administrative problems for the Department of Corrections in calculating a constitutional release date for the inmates in their custody. Given the decisions of the United States Supreme Court, the key date for determination of an inmate's gain time entitlement is the date of the criminal offense.

Lancaster: Factual and Procedural History

Lancaster's underlying offense occurred on May 3, 1987, and he was given an incarcerative sentence followed by a specified period of probation. Due to the award of several types of gain time including Administrative Gain Time and Provisional Credits, Lancaster was released in 1991 to begin service of the probationary portion of his sentence. Lancaster violated his probation and it was revoked in 1994. Lancaster was then resentenced. At that time, Lancaster was given credit for his previously awarded incentive and basic gain time (because his offense occurred before October 1, 1989, the effective date of the amendment to the gain time forfeiture statutes providing for forfeiture of all gain time upon the revocation of probation, community control or Provisional Release). *See* §§ 944.28(1), 948.06(6), Fla. Stat. (1989); *State v. Green*, 547 So. 2d 925 (Fla. 1989)(concerning the need for statutory authority for gain time forfeiture), *modified*, *Dowdy v. Singletary*, 704 So. 2d 1052 (Fla. 1998).

The significant fact for *this* case, however, is that Lancaster was *not* given credit for his previously awarded overcrowding gain time (Administrative Gain Time and Provisional Credits). He was not given credit because, in accordance with our decision in *Tripp v. State*, 622 So. 2d 941, 942 n.2 (Fla. 1993),[2] overcrowding gain time was not included under the general rubric of "gain time" which an inmate was entitled to under our prior opinion in *State v. Green*, 547 So. 2d 925 (Fla. 1989). These decisions were rendered prior to the United States Supreme Court decision in *Lynce*.

The Fourth District Court in its appeal of this case held that Lancaster had a vested right in the benefits of the Administrative Gain Time statute which was in effect at the time of the offense. *Lancaster v. State*, 656 So. 2d 533 (Fla. 4th DCA 1995), *quashed*, 687 So. 2d 1299 (Fla.), *vacated*, 118 S. Ct. 37 (1997). On review of that decision, we found conflict[3] between the Fourth District's decision in *Lancaster* and our decision in *Orosz v. Singletary*, 655 So. 2d 1112 (Fla. 1995), *superseded by* 693 So. 2d 538 (Fla. 1997)(on rehearing). We quashed the Fourth District's decision explaining that it had misinterpreted our decision in *Orosz* and the holdings in several other cases. *See Lancaster*, 687 So. 2d at 1300; *see also* Art. I, § 10, Fla. Const.; U.S. Const. art. I, § 10. We clarified that our holding in *Orosz* was narrow and only stood for the proposition that for a certain interval of time, the State lost its statutory authority to combine consecutive sentences into a single term (or overall sentence) for the purpose of awarding or forfeiting gain time. *Lancaster*, 687 So. 2d at 1299. We further indicated that *Orosz* only applied to an inmate who: (1) committed an offense during the interval between July 1, 1978, and June 16, 1983; (2) was in service of a sentence at the time of the offense; (3) was given a sentence to run consecutively to the sentence for the previous offense; and (4) had completed the sentence for the previous offense before June 17, 1993. We also reaffirmed our position that overcrowding gain time was not subject to the Ex Post Facto Clause, citing to our decision in *Calamia v. Singletary*, 686 So. 2d 1337 (Fla. 1996). *See also Lancaster*, 687 So. 2d at 1299-1300.

It is clear that our previous opinion in this case consisted of two parts. The first part clarified the holding in *Orosz* and the second part reaffirmed our original decision in *Calamia*. Our opinion in *Orosz* was not based on ex post facto principles, but rather on statutes concerning the appropriate calculation of consecutive sentences. It is important to emphasize that the clarification of *Orosz* in our original *Lancaster* opinion is unaffected by this decision. Further, we expressly reaffirm that clarification.

As noted, the second part of our decision in *Lancaster* held that there was no constitutional violation when inmates were not given credit for the Administrative Gain Time and Provisional Credits awarded during the incarcerative portion of their initial sentences (before their probation revocation) because such overcrowding gain time was not subject to the Ex Post Facto Clause. That part of our prior opinion is clearly affected by *Lynce*, as set forth below.

Application of *Lynce* to Lancaster

Three statutes were enacted after the commission of Lancaster's criminal offense which could be asserted as a legal basis to cancel Lancaster's overcrowding gain time. The first two were 1989 amendments to sections 948.06 and 944.28 (1). *See* § 944.28(1); 948.06(6), Fla. Stat. (1989). They added revocation of probation, community control, and provisional release to the circumstances permitting gain time forfeiture. *Id.* The third statute was section 944.278, Florida Statutes (1993), which was part of the act know as the "Safe Streets Initiative" enacted on June 17, 1995. It canceled credits for inmates in custody or upon their return to custody.

The State asserts that when Lancaster was returned to prison in 1994, the State did *not* apply section 944.278 (the Safe Streets Initiative) to Lancaster to cancel his overcrowding gain time because *before* Lancaster was returned to prison, i.e., at resentencing, Lancaster had already been denied credit for his overcrowding gain time. Therefore, the State maintains that there were no overcrowding credits to cancel under section 944.278. The State alleges, however, that overcrowding gain time is *still* distinguishable from "regular" (basic and incentive) gain time and that although there is no viable statutory authority for its forfeiture under *Green*, the State does not *need* any statutory authority to deny credit for overcrowding gain time. The State maintains that overcrowding gain time is distinguishable because: (1) this Court stated in *Bowles v. Singletary*, 698 So. 2d 1201 (Fla. 1997), that Bowles' Control Release credits (another type of overcrowding gain time) had been "used" to attain early release and had not been cancelled by any subsequent legislation, and (2) that overcrowding gain time is not "earned."

We reject the contention that there is such a distinction. First, we note that like other types of gain time, the State must have statutory authority to forfeit overcrowding gain time upon supervision revocation. *See generally State v. Green*, 547 So. 2d 925 (Fla. 1989). We find, however, that in some cases, the State may claim statutory authority to forfeit overcrowding gain time. Section 944.28(1) states that "If the . . . probation . . . granted to [the prisoner] is revoked, the department may, without notice or hearing, declare a forfeiture of *all* gain-time earned according to the provisions of law by such prisoner prior to . . . his release." (Emphasis added.)[4] Section 944.06(6) states that "whenever probation . . . is revoked, the offender, by reason of his misconduct, may be deemed to have forfeited *all* gain-time." (Emphasis added.)[5] It appears that the State believes that neither of those sections includes Provisional Credits or Administrative Gain Time. We believe, however, that sections 944.28(1) and 948.06(6) do provide the State with such authority but they can only be invoked for inmates whose underlying offenses were committed on or after October 1, 1989 (the effective date of the amendments providing for such forfeitures). Lancaster's original offense was committed before that date and thus the State cannot forfeit his Provisional Credits or Administrative Gain Time under those statutes.

We further reject the argument that Lancaster's overcrowding gain time has already been canceled or may now be canceled pursuant to section 944.278, Florida Statutes (1993)(the Safe Streets Initiative). We expressly hold that the application of that section to Lancaster would violate ex post facto principles.

As mentioned above, the Safe Streets Initiative was enacted in 1995. It canceled all Administrative Gain Time and Provisional Credits for all inmates in custody. The act did not cancel such credits for releasees unless and until they were returned to custody. Section 944.278 provides, in pertinent part:

> *All awards of administrative gain-time under s. 944.276 and provisional credits under s. 944.277 are hereby canceled for all inmates serving a sentence or combined sentences in the custody of the department*, or serving a state sentence in the custody of another jurisdiction. Release dates of all inmates with 1 or more days of such awards shall be extended by the length of time equal to the number of days of administrative gain-time and provisional credits which were canceled. *Inmates* who are out of custody due to an escape or a release on bond, or *whose postrelease supervision is revoked on or after the effective date of this act, shall have all administrative gain-time and provisional credits canceled when the inmate's release date is reestablished upon return to custody*. Offenders who are under provisional release supervision as of the effective date of this section shall be subject to the terms and conditions established at the time of release until such offenders have been discharged from supervision. Offenders who have warrants outstanding based on violation of supervision as of the effective date of this section, or who violate terms of supervision subsequent to enactment of this section, shall be terminated from supervision and returned to custody. All provisional credits shall be canceled when an offender's tentative release date is reestablished.

§ 944.278, Fla. Stat. (1993) (emphasis added). We conclude that both the first emphasized portion of section 944.278 providing for the cancellation of the awards for "*all inmates serving a sentence or combined sentences in the custody of the department*," and the second emphasized portion providing for the cancellation of credits *specifically* directed at *releasees would* technically cover Lancaster's situation.

The State argues that the portion of the Safe Streets Initiative concerning the cancellation of credits *specifically* directed at *releasees* (the second emphasized section above) would be constitutional even if it were applied to inmates whose original offenses were committed prior to enactment, so long as *the misconduct* necessitating the revocation of supervision was committed after the enactment of section 944.278. The State argues that there is a critical distinction between laws that change the penalty for the original offense and laws that change penalties for new behavior, which results in the revocation of post-release supervision.

The State asserts that the circumstances surrounding the loss of Lancaster's overcrowding gain time were factually different from those surrounding Lynce's case. It argues that while Lynce committed no violation of any terms of release, Lancaster, on the other hand, *violated* the terms of his release. *See Lynce v. Mathis*, 519 U.S. at 436. In other words, it is asserted that Lynce's case concerned a *cancellation* of overcrowding credits without any subsequent misbehavior on Lynce's part while Lancaster's case concerned a *forfeiture* of overcrowding credits due to the revocation of probation caused by Lancaster's subsequent misbehavior. We note, however, that Lancaster had already been released on probation by the time the Safe Streets Initiative was enacted. Furthermore, we have already rejected the "subsequent or future misconduct" argument in our recent decision in *Britt v. Chiles*, 704 So. 2d 1046, 1047 (Fla. 1997). In that case, the State argued that there was no ex post facto violation when it retroactively applied a later-enacted statute and rule which provided for a mandatory disciplinary punishment consisting of up to a six-month period of time in which inmates were made ineligible to receive gain time. The State argued that while there was no such mandatory provision in the statutes in effect at the time of Britt's offense, there was no constitutional violation because the increased punishment was due to Britt's future or subsequent misconduct, not the original crime. We concluded that under *Weaver v. Graham* 450 U.S. 24, 34 (1981), as reaffirmed in *Lynce v. Mathis*, 519 U.S. at 442, the new provision violated ex post facto principles because, "by curtailing the availability of future credits it effectively postpone[d] the date when [an inmate] would become eligible for early release." *Britt*, 704 So. 2d at 1048 (quoting *Lynce*, 519 U.S. at 442). Accordingly, we find we are required to reject the State's "subsequent or future misconduct" argument in this case as well.

There is also the question of whether the State can constitutionally invoke the aforementioned first emphasized portion of section 944.278 providing for the cancellation of the awards for "*all inmates serving a sentence or combined sentences in the custody of the department*."

Before *Lynce* was decided, the time of the offense was the only relevant time frame for determining whether an inmate had an ex post facto right to a certain benefit. *See Weaver v. Graham*, 450 U.S. 24, 30 (1981). Further, there was no ex post facto violation where a retroactive change affected a benefit, if, at the time of the offense, the desired benefit was merely speculative. *See California Dept. of Corrections v. Morales*, 514 U.S. at 499, 509 (1995). After *Lynce*, however, an ex post facto inquiry involves not only looking at the time of offense, but also involves looking at subsequent time frames as well to determine whether a possible, yet speculative benefit has become more definite. *See Lynce v. Mathis*, 519 U.S. at 446. In *Lynce*, the grant of overcrowding credits was speculative at the time of that inmate's offense because no one could tell for sure whether

the prison overcrowding levels would be ... o extreme as to trigger the relevant overcrowding statutes. Nev...eless, Lynce was subsequently awarded a certain amount of credits which ultimately led to his release from incarceration. Therefore, by the time Lynce was released, the credits were clearly no longer non-quantifiable or unknown. On the contrary they had become a certainty. *Id.* (concluding that "unlike in *Morales*, the actual course of events makes it unnecessary to speculate").

In the present case, as in Lynce's case, at the time of Lancaster's offense overcrowding gain time had already been provided for by statute. *See* § 944.598, Fla. Stat. (Supp. 1986) (Emergency Gain Time); § 944.276, Fla. Stat. (1987) (Administrative Gain Time). Accordingly, Lancaster could have contemplated receiving overcrowding credits at the time of his offense. Furthermore, Lancaster *did* receive these credits and was actually released by way of the above-mentioned statutes. Furthermore, when Lancaster was released on probation, the 1993 Safe Streets Initiative had not been enacted yet. Thus, akin to the situation with Lynce, Lancaster's "hope" of receiving overcrowding gain time had become a reality.

As mentioned above, the Safe Streets Initiative was enacted in 1993, long after Lancaster's underlying offense and approximately two years after his release on probation. If the State were to now apply that later-enacted law to Lancaster and cancel his overcrowding gain time, the effect of that law would be to retroactively take away something to which Lancaster had an expectation at the time of his offense, actually received during his incarceration, and actually retained after revocation or must now be awarded because the 1989 forfeiture provision, section 944.28(1), may not be applied to him (as discussed above). We find that the application of the Safe Streets Initiative to Lancaster *now* would result in the taking of something which was certainly *not* speculative. Accordingly, we conclude that under the analysis of *Lynce*, the State cannot apply section 944.278 (the Safe Streets Initiative) to Lancaster to cancel his Administrative Gain Time or Provisional Credits without violating the Ex Post Facto Clause. *See also Jackson v. Singletary*, 695 So. 2d 494 (Fla. 3d DCA 1997) (applying first part of section 944.278 canceling awards for all inmates serving sentences in DOC's custody to petitioner would be an ex post facto violation based on analysis in *Lynce*); *State ex rel. Florida Dept. of Corrections v. Stevenson*, 695 So. 2d 727 (Fla. 5th DCA 1996) (finding it unconstitutional to apply second part of section 944.278 to Stevenson, who had been *released* prior to the statute's enactment, because such inmates could not have contemplated the later-enacted statute's "additional consequences for their violation of probation"), *review granted*, 687 So. 2d 1306 (Fla. 1997).

For the foregoing reasons, we approve the result of the Fourth District's decision finding that the State cannot cancel or forfeit Lancaster's Provisional Credits or his Administrative Gain Time.

It is so ordered. (HARDING, C.J., and SHAW, KOGAN and ANSTEAD, JJ., concur. WELLS, J., dissents with an opinion. PARIENTE, J., recused.)

(WELLS, J., dissenting.) In accord with Justice Grimes' dissent in *Britt v. Chiles*, 704 So. 2d 1046 (Fla. 1997), in which I joined, I dissent to the majority's unwarranted and unnecessary extension of *Lynce v. Mathis*, 519 U.S. 433 (1997), to the facts of this case. The United States Supreme Court does not require this reversal.

This case is plainly distinguishable from *Lynce* by the fact that Lancaster violated the terms of his release.

[1]In *Meola*, we address gain time in the context of prisoners who had their Administrative Gain Time and/or Provisional Credits *canceled*. We hold that the petitioners are not entitled under ex post facto principles to the *reinstatement* of the overcrowding credits that they had actually been awarded, but which were subsequently canceled. We also hold that the petitioners were accorded due process in the cancellation of the credits and that there was no equal protection violation.

In *Thomas*, we address the extension and then cancellation of prisoner's release dates under the Control Release program. We hold that since inmates were always on notice that their control release dates could be changed to a later date, the legislative amendments to the program and, ultimately, the cancellation of their release dates did not result in an ex post facto violation.

In *Gomez*, we address gain time in the context of prisoners who were never awarded certain types of credits but *should have been awarded such credits*. We hold that the subsequent revisions in the prison overcrowding statutes which effectively made the petitioners ineligible to receive any credits constituted an ex post facto violation.

While each of these opinions are similar because they discuss the effect that the United State's Supreme Court decision in *Lynce v. Mathis* has had on gain time caselaw, they are clearly distinguishable, as discussed below.

[2]In footnote 2 of our opinion in *Tripp* we noted that "prior to the enactment of chapter 89-531, Laws of Florida, 'credit for time served' included jail time actually served and gain time granted pursuant to section 944.275, Florida Statutes (1991). *State v. Green*, 547 So. 2d 925, 927 (Fla. 1989). It does not include 'provisional credits' or 'administrative gain time' which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison. *See* § 944.277, Fla. Stat. (1991). By virtue of chapter 89-531, the revocation of probation or community control now serves to forfeit any gain time previously earned. This change in the law is inapplicable to Tripp because his crimes were committed before October 1, 1989, the effective date of the act." *Tripp*, 622 So. 2d at 943 n.2. Prior to that date, there was statutory authority for the forfeiture of gain time upon revocation of parole and clemency, but not probation, community control, or provisional release. *See* § 944.28(1), Fla. Stat. (1989); ch. 89-531, § 6, at 2717, § 20, at 2721, Laws of Fla.; § 948.06(6), Fla. Stat. (1989); ch. 89-531, § 13, at 2720; § 20, at 2721, Laws of Fla.

[3]*See* Art. V, § 3(b)(3), Fla. Const.

[4]Section 944.28(1), Fla. Stat. (1989), as amended by chapter 89-531, section 6, at 2717, Laws of Florida, provided in pertinent part:

> If a prisoner is convicted of escape, or if the clemency, conditional release as described in chapter 947, *probation* or community control as described in s. 948.01, provisional release as described in s. 944.277, or parole granted to him is revoked, the department may, without notice or hearing, declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to such escape or his release under such clemency, conditional release, *probation*, community control, provisional release, or parole.

(Emphasis added). As amended, this section went into effect on October 1, 1989. *See* ch. 89-531, § 2, at 2721, Laws of Fla.

[5]Chapter 89-531, section 13, Laws of Florida added subsection 6 to section 948.06, Florida Statutes. That amendment was codified in section 948.06(6), Florida Laws (1989), and provides, in pertinent part:

> Notwithstanding any provision of law to the contrary, whenever probation or community control, including the probationary or community control portion of a split sentence, is violated and the probation or community control is revoked, the offender, by reason of his misconduct, may be deemed to have forfeited all gain-time or commutation of time for good conduct, as provided by law, earned up to the date of his release on probation or community control from a state correctional institution. This subsection does not deprive the prisoner of his right to gain-time or commutation of time for good conduct, as provided by law, from the date on which he is returned to prison.

This section also went into effect on October 1, 1989. *See* ch. 89-531, § 20, at 2721, Laws of Fla.

APPENDIX

Overcrowding relief programs - Dates - Thresholds

Emergency Gain Time § 944.598	Admin. Gain Time § 944.276	Prov. Credits § 944 .277	Control Release § 947.146
6/16/83-6/1/86 : 98% of LC*	2/5/87-6/30/88: 98% of LC*	7/1/88-6/31/90: 97.5% of LC*	9/1/90-6/16/93: below 97.5% of LC*
6/2/86-6/16/93 : 98% of LC*		9/1/90-6/17/93: 98% of LC*	6/17/93-4/24/95: at or below 97.5% of LC*
			4/25/95-6/9/95: between 99% and 100% of LC**
			6/10/95-present: between 99% and 100% of TC**

* LC = Lawful Capacity. See relevant statute referred to above. See also Costello v. Wainwright, 397 F. Supp. 20, 22 (M.D. Fla. 1975), aff'd 525 F.2d 1239 (5th Cir. 1976); see also § 944.023(1)(b); § 944.598(6)(b) (note 1), Fla. Stat. (Supp. 1992).

** TC = Total Capacity. See relevant statute referred to above. In 1995, "Lawful Capacity" was changed to "Total Capacity" and the definition now meant 150% of the total design capacity (except that certain areas such as the medical and mental facilities were to be maintained with less inmate population). See § 947.146(2), 944.023(b), Fla. Stat. (1995); ch. 95-251, §§ 1, 4, at 2235-36, 2238, Laws of Fla.

Emergency gain time was repealed effective June 17, 1993. See ch. 93-406, § 32, Laws of Fla. Emergency gain time was repealed effective June 17, 1993. See ch. 93-406, § 32, Laws of Fla. Administrative gain time was repealed effective July 1, 1988. See § 944.276, Fla. Stat. (1988); ch. 88-122, § 6, Laws of Fla. The provisional credits program was repealed and all provisional credits and administrative gain time were canceled effective June 17, 1993. See § 944.278, Fla. Stat. (1993); ch. [illegible] Laws of Fla. The Control Release [illegible]

Case No. A-739
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1998

STATE OF FLORIDA, *Petitioner,*

v.

ANTHONY LANCASTER, *Respondent.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 1999, I served three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari on opposing counsel, at the following address, by placing same in the United States Mail, with first-class postage prepaid:

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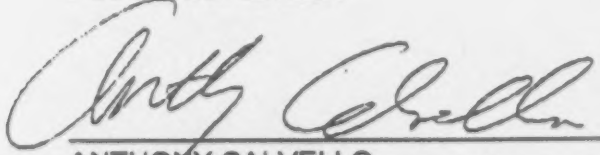

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NOTARY PUBLIC

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September 23, 2002
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